UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN BEER DISTRIBUTORS, Respondent, and JOE GARCIA DIAZ, Charging Party.	:	Case No. 29-CA-115694

MANHATTAN BEER DISTRIBUTORS LLC'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Manhattan Beer Distributors LLC ("Manhattan Beer" or "Respondent") submits this brief in support of its Cross-Exceptions to the Decision of Administrative Law Judge Steven Davis (the "ALJ"), issued May 15, 2014 (the "ALJ Decision"). While the ALJ concluded correctly that Manhattan Beer did not unlawfully discharge Charging Party Joe Garcia Diaz ("Diaz"), he erred in another conclusion that Manhattan Beer technically violated standards set under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) ("*Weingarten*"). The General Counsel has filed Exceptions to the Administrative Law Judge's Decision, and Manhattan Beer now files its cross-exceptions and this supporting brief in accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board").

As explained below, the record evidence and dispositive Board law establish that the ALJ erred in material respects in certain of the findings, analysis, discussion and conclusions of the ALJ Decision, principally because: (1) Manhattan Beer managers, trained and certified in observing reasonable suspicion of drug use, determined there was reasonable suspicion that Diaz had used drugs when he reported for work on June 8, 2013[1] reeking from marijuana and with bloodshot and glassy eyes; (2) Diaz, a former shop steward, made decisions to either participate in discussions with Manhattan Beer managers or consult representatives of his choosing; (3) Diaz made his own decisions with respect to the advice he would accept or reject; (4) Diaz decided he would refuse to take the drug test offered by Manhattan Beer as a means to refute the reasonable suspicion of his drug use; and (5) without a drug test refuting its managers' reasonable suspicion, in accordance with the language of its collective bargaining agreement (the "CBA") with Laundry, Distribution and Food Service Joint Board ("LDFSJB") and established

[1] Unless otherwise noted, all dates refer to 2013.

company practice, Manhattan Beer managers lawfully concluded their investigation and discharged Diaz based on available facts – and without a drug test.

For the reasons stated in this brief, Manhattan Beer respectfully submits that the ALJ erred in not dismissing the Complaint in its entirety.

STATEMENT OF FACTS

A. Manhattan Beer's Business and Policies Concerning Drug Testing

Manhattan Beer is a major distributor of beer and other beverages, servicing a fifteen county area in New York State from five separate facilities located in the Bronx, Brooklyn, Queens, Wyandanch and Suffern at times relevant to Diaz's employment. (Tr. 109)[2] A bargaining unit of approximately 700 Manhattan Beer employees employed in warehouse and distribution functions is represented for purposes of collective bargaining by LDFSJB. (Tr. 105)

Manhattan Beer strives to maintain a drug-free organization, with safety – rather than discipline – the objective of its drug testing policy. (Tr. 111; 156) To help address objectives of its drug-free policy, Manhattan Beer has engaged a consultant, JW Rufolo, to conduct reasonable suspicion training and certification of managers. (R Ex. 10; Tr. 111; 155) In their reasonable suspicion training course, Manhattan Beer managers learn about behaviors that may indicate a person is under the influence of drugs or alcohol. (Tr. 155) The only managers having authority to determine whether there is reasonable suspicion that an employee is under the influence of drugs or alcohol are those who have participated in the training course and have passed a test and received a training certificate. (R Ex. 10; Tr. 155–56) Roy Small, Manhattan

[2] Throughout this brief, references to the ALJ's Decision shall be (ALJD __); references to the official transcript of the hearing shall be (Tr. __); references to General Counsel's Exhibits shall be (GC Ex. __); and references to Respondent's Exhibits shall be (R Ex. __).

Beer's Wyandanch facility Delivery Manager ("Small"), received such training, passed his test and received a training certificate. (R Ex. 10; Tr. 154-55)

Under Manhattan Beer's policy, if a trained manager observes behavior indicating there is a reasonable suspicion that an employee is under the influence of drugs or alcohol, the manager instructs the employee to submit to a reasonable suspicion drug test. (Tr. 157) By operation of Manhattan Beer's reasonable suspicion drug testing policy, an employee receives the opportunity to submit to a drug test capable of trumping a manager's reasonable suspicion of drug usage. (Tr. 114-15; 138)

Manhattan Beer's policies prohibiting improper use of drugs, and Manhattan Beer's right to test employees for drugs and alcohol, have evolved and been memorialized in a series of collective bargaining agreements with LDFSJB. (R Ex. 2) The portion of the CBA relevant to Diaz provides:

> 39. SUBSTANCE ABUSE AND TESTING
>
> 39.1. The Employer and the Union recognize that employee drug and alcohol abuse may have an adverse impact on, among other things, the general health, welfare and safety of employees and the Employer's operations.
>
> 39.2. Any employee who possesses, is impaired by, uses, manufactures, distributes, dispenses or sells narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances or alcohol when reporting for work or while on the job or on the Employer's property is subject to immediate disciplinary action, up to and including termination of employment.
>
> 39.3. The Employer shall have the right to test employees for drugs and alcohol usage only as permitted by this provision.
>
> 39.4. The Employer may test drivers as required by applicable law or governmental regulations.
>
> 39.5. All testing shall comply with Department of Transportation and Federal Highway Administration guidelines,

> including those concerning accuracy, confidentiality, and personal privacy.
>
> 39.6. Employees other than drivers may be tested only: (i) when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol or (ii) promptly following an accident which reasonably appears to be the fault of the employee or (iii) for follow-up testing during a period of one (1) year after an employee who has tested positive is permitted to return to employment.

(R Ex. 2)

Consistent with the "accuracy, confidentiality, and personal privacy" required by the CBA, Manhattan Beer follows a strict protocol of procedures and test validators, including accompanying the donor to an independent collection site and maintaining no presence during the specimen collection process. (Tr. 157-59; R Ex. 11)

Manhattan Beer routinely uses LabCorp to conduct drug testing specimen collection, and a Manhattan Beer manager or supervisor typically accompanies the employee to a LabCorp or other drug testing facility for testing. (Tr. 160) While at the drug testing facility, the Manhattan Beer representative does not participate in the testing procedure, but rather waits separately in a waiting room. (Tr. 159) The Chain of Custody Form for the test is given to the clinician, who escorts the employee to a private bathroom that is quarantined for specimen collection; after providing the specimen in the container, the donor employee affixes a container seal bearing a distinct specimen identification number to the specimen container. (R Ex. 11; Tr. 158-59) The Chain of Custody Form is then completed by the clinician, with copies for: (i) the laboratory; (ii) the medical review officer; (iii) the collector; (iv) the employer; and (v) the donor. (R Ex. 11; Tr. 158) Drug test reports are received by Manhattan Beer's Human Resources department. (Tr. 115)

Drug testing is intended for the benefit of employees by allowing them to overcome the reasonable suspicion that otherwise would result in their employment termination (Tr. 115), and refusal to submit to a drug test is treated by Manhattan Beer as showing a positive result (Tr. 133-34). Although it is not a common occurrence, Manhattan Beer has terminated the employment of employees other than Diaz who did not submit to a drug or alcohol test that could have refuted reasonable suspicion. Confronted with reasonable suspicion, Felix Marin was discharged after refusing an alcohol test (Tr. 125-26; R Ex. 7), and Greg Irving was discharged after refusing a drug test (Tr. 128-30; R Ex. 8).[3]

B. Diaz's Employment by Manhattan Beer and History of Drug Testing

Diaz commenced employment with Manhattan Beer at its Wyandanch facility in August 2010. (Tr. 35) While Diaz was employed as a night shift forklift operator, he served also as a shop steward from 2011 until the spring of 2012. (Tr. 46) In December 2012, Diaz requested a transfer to a day shift position as driver's helper; when the request was granted, he moved into a position as a helper and voluntarily relinquished his role as shop steward. (Tr. 38; 47) Diaz's job duties as a helper included assisting in the loading, unloading, and delivery of Manhattan Beer's products to customers. (Tr. 39)

In connection with completing his application for employment with Manhattan Beer, Diaz executed his acknowledgment of a "Company Policy - Pre-Employment Drug Screening" on August 9, 2010 ("Manhattan Beer's Drug Policy"). (GC Ex. 3) Manhattan Beer's Drug Policy provides:

> Manhattan Beer Distributors LLC is committed to provide its employees with a safe work place and promote programs that encourage high standards of employee health. For their part, all

[3] Analogously, John Reyes was discharged after refusing to take a post-accident test that could have indicated that drug or alcohol use was not a factor in a work-related accident. (Tr. 132-33; R Ex. 9)

> employees are expected to be in a suitable mental and physical condition while at work and to perform their jobs in a satisfactory fashion. In instances in which the use of alcohol or other drugs interferes with these goals, appropriate action will be taken.
>
> The possession, sale or use of illegal drugs obtained without prescription is inconsistent with our company's objective of operating in a safe and efficient manner. Accordingly, no officer or employee shall use or have such items in his or her possession during working hours or on company property at any time. Additionally, no officer or employee shall report to work while under the influence of such drugs. Employees who engage in such conduct will be subject to discipline up to and including discharge.
>
> All applicants considered for employment will be subject to drug screening. Applicants will be requested to sign a consent release form authorizing the drug screening and the submission of its results to our company. Applicants who refuse to sign a consent release form or who test positive for illegal drugs will not be considered for employment.

Id. Diaz read this document, and understood that if Manhattan Beer concluded that he reported to work under the influence of drugs or alcohol, he was subject to discipline, up to and including termination. (Tr. 51; 78)

Not only is Diaz familiar with Manhattan Beer's Drug Policy, but he knows from his own experience of pre-employment and return-to-duty testing how the process works. (Tr. 48-49; 80) During both of these drug tests, no one was present when Diaz gave a urine specimen, no one was in the bathroom with him, and no LDFSJB or other representative was present either at the facility or in the toilet area where he gave the specimen. (Tr. 82-85)

Diaz acknowledges that Manhattan Beer has the right to discharge an employee who reports for work apparently under the influence of drugs – and he admits that he knew that when he refused to take the reasonable suspicion drug test on June 8. (Tr. 89)

C. Diaz's June 8 Employment Termination for Reporting to Work under the Influence of Marijuana

While working on June 7, Diaz was injured and he reported a work-related injury to Manhattan Beer. (Tr. 161-62) Aware of this report, Small had anticipated that Diaz would be absent and therefore did not schedule Diaz for a helper assignment on June 8. (Tr. 161-62; 170-71) However, Diaz reported to work at approximately 6:30 a.m. on June 8. (Tr. 52) After clocking in, Diaz looked at the routing schedule and noted he was not scheduled for a helper route assignment. (Tr. 53-54) Small first saw Diaz when Diaz came to the window of the office where Small worked. (Tr. 162) Diaz opened the window to the office and leaned inside to speak with Small. (Tr. 170) Small immediately noted that Diaz reeked of the smell of marijuana and that Diaz's eyes were bloodshot and glassy. (Tr. 162) Wyandanch Facility Manager Tony Wetherell ("Wetherell"), who was standing nearby, commented that Diaz smelled "funny" and asked Diaz if he "was doing anything stupid." (Tr. 86-87; 99) Then and there, it registered with Diaz that Wetherell must have detected his marijuana usage: "at this time I concluded that Tony was talking about marijuana and how he thought it smelled on me." *Id.*

On the morning of June 8, Diaz was aware that if he reported for work apparently under the influence of drugs he would not get a work assignment and Manhattan Beer would have the right to terminate his employment. (Tr. 89) Similarly, Small was aware that safety concerns precluded a work assignment to an individual whom he reasonably suspected of being under the influence of marijuana. (Tr. 162) Therefore, rather than assigning Diaz to a route, Small properly directed Diaz to submit to a reasonable suspicion drug test. (Tr. 162-63)[4]

[4] Small did not instruct Diaz to submit to an alcohol test because, based on his reasonable suspicion recognition training, he did not observe behavior that would lead to a reasonable suspicion that Diaz was under the influence of alcohol. (Tr. 164)

In response to Small's direction to take a reasonable suspicion drug test, Diaz stated he felt his rights were being violated and that he wanted to speak with Wyandanch facility shop steward Joe Gonzalez ("Gonzalez"). (Tr. 163) Diaz then left the office where Small worked and called and spoke with shop steward Gonzalez, who was not on site at the Wyandanch facility on Saturday, June 8, his day off. (Tr. 66; 163). Small remained in his office during this period. (Tr. 177) Approximately 15 to 20 minutes later, and after speaking with shop steward Gonzalez, Diaz returned to the office. (Tr. 163; 175) Small then inquired about Diaz's conversation with shop steward Gonzalez, but Diaz declined to reveal anything discussed, saying, "that's between me and my shop steward." (Tr. 163; 176) Small then called shop steward Gonzalez and informed him that Diaz reeked of marijuana and had bloodshot and glassy eyes, creating Small's reasonable suspicion that Diaz should be taken for a drug test. (Tr. 163) Gonzalez told Small, "I understand, do what you have to do." (Tr. 163) Small then reminded Diaz that his failure to submit to a reasonable suspicion drug test would be treated the same as a positive result, potentially resulting in employment termination. (Tr. 165) Nevertheless, Diaz told Small that he was not going to take the drug test. (Tr. 165)

After refusing to take the drug test, Diaz remained on the Wyandanch facility premises until he clocked out at approximately 8:24 a.m. (Tr. 121; R Ex. 5, at 6) Diaz did not subsequently return to work at Manhattan Beer. (Tr. 52)

Small filled out an "Observed Behavior – Reasonable Suspicion Record" recording his observations of Diaz on the morning of June 8. (R Ex. 5, at 7) The report indicates that there was reasonable suspicion that Diaz was under the influence of drugs, based on his "bloodshot" and "glassy" eyes, and the fact that his "clothing reeked of the smell of marijuana." (R Ex. 5, at 7) Small and Wetherell both witnessed Diaz's behavior and signed the report indicating that,

based upon their observations of Diaz and their prior reasonable suspicion recognition training, there was reasonable suspicion that Diaz had reported to work while impaired by drugs. (R Ex. 5, at 7; Tr. 166-67)

Small also completed a "Progressive Disciplinary Report" ("PDR") memorializing the events of the morning of June 8. (Tr. 167-68; R Ex. 5, at 2) The PDR states:

> On Saturday, June 08, 2013, Joe Garcia Diaz reported to work at 6:33 a.m. under the influence of a controlled substance. Joe Garcia Diaz's eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana. Joe Garcia Diaz was told he must go for a drug screening because it's against Manhattan Beer's policy to have an employee working impaired in the trade delivering beer to customers or operating equipment impaired under the influence of narcotics.

(R Ex. 5, at 2) The PDR was signed by Small, Wetherell, and shop steward Gonzalez. (R Ex. 5, at 2)

D. Diaz's Explanation of His Refusal to Submit to Drug Testing on June 8

Diaz acknowledges that Manhattan Beer has the right to discharge an employee who reports for work apparently under the influence of drugs – and he understood as much on June 8, the day he was confronted by management for smelling "funny" and reeking of marijuana. (Tr. 89) Diaz also testified that taking a drug test was fine with him and he had no problem taking a drug test. (Tr. 64; 68) Nevertheless, according to his testimony, Diaz refused to take the drug test on June 8 after conferring with shop steward Gonzalez because Diaz wanted to see CBA language that Gonzalez could not supply because Gonzalez would not go to the Wyandanch facility on his day off and Gonzalez did not have a copy of the new version of the CBA with him when he spoke to Diaz. (Tr. 67-68) Gonzalez left it to Diaz to decide whether to refuse to take

the drug test if Diaz "felt strongly enough" that his rights were being violated and that he needed representation. (Tr. 68)[5]

According to Diaz's testimony, he then refused to take the drug test, saying to Small and Wetherell that while he had no problem taking the test, he felt his rights were being violated and that he wanted his shop steward present but the shop steward was not available. (Tr. 69) Small again requested that Diaz refute management's reasonable suspicion by submitting to a drug test and passing it, but Diaz again declined. (Tr. 69-70) With Diaz's position set, Manhattan Beer did not pursue drug testing any further; Small and Wetherell concluded their discussion with Diaz, telling him to clock out and go home. (Tr. 70-71) Diaz's employment termination was confirmed and finalized during a grievance meeting on June 20. (R Ex. 6)

QUESTIONS INVOLVED AND TO BE ARGUED

1. Did the ALJ erroneously rely upon the contents of a document for a factual finding after sustaining an objection to the admissibility of the document and rejecting it? (Respondent's Cross-Exception 1)

2. Did the ALJ erroneously analyze when Diaz's *Weingarten* rights attached? (Respondent's Cross-Exceptions 2, 3, 5 and 7)

3. Did the ALJ err by stating that Manhattan Beer required a drug test and insisted that Diaz take a medical test? (Respondent's Cross-Exception 6)

4. Did the ALJ err in stating the role of a *Weingarten* representative in the circumstances of Diaz's situation on June 8? (Respondent's Cross-Exception 4)

5. Did the ALJ err by stating that "[a]ll the documents prepared by the Respondent at the time of [Diaz's] discharge recite that he was fired for refusing to take the test"? (Respondent's Cross-Exception 12)

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[5] Based on testimony at Diaz's unemployment insurance benefit hearing, Unemployment Insurance Appeal Board Administrative Law Judge Wedderburn found that Diaz "conferred with his union representative and was not told to refuse the test." (R Ex. 1; Tr. 93) Diaz did not appeal the decision denying his unemployment insurance benefits. (Tr. 89-90)

6. Did the ALJ err by failing to find that Manhattan Beer acted permissibly on the basis of the available information of reasonable suspicion of its managers after Diaz rejected the opportunity to take a drug test?
(Respondent's Cross-Exceptions 10 and 11)

7. Did the ALJ err by holding that *Weingarten* requires the "physical presence" of a representative and that Manhattan Beer denied Weingarten rights by proceeding without the physical presence of a representative?
(Respondent's Cross-Exceptions 7, 13, 14, 15 and 17)

8. Did the ALJ erroneously conclude in his Conclusions of Law that Diaz did not receive "prior" advice, when in reality Diaz received advice on June 8 from two Representatives?
(Respondent's Cross-Exceptions 8, 9, 16)

9. Did the ALJ erroneously order Manhattan Beer to cease and desist from denying Diaz Weingarten rights?
(Respondent's Cross-Exception 18)

ARGUMENT

POINT I

AFTER SUSTAINING AN OBJECTION TO THE ADMISSIBILITY OF AN OFFERED DOCUMENT AND REJECTING THE DOCUMENT AS AN EXHIBIT, THE ALJ ERRONEOUSLY RELIED UPON ITS CONTENTS FOR A FACTUAL FINDING

(Respondent's Cross-Exception 1)

The ALJ sustained an objection to the admissibility of a document the General Counsel offered as results of a drug test Diaz purportedly took after June 8, rejecting the document as an exhibit. (Tr. 186; Rejected GC Ex. 5) There is no record testimony whatsoever indicating the outcome of a purported drug test Diaz may have taken after June 8, or the circumstances of any such purported test. (Tr. 183-87) In such circumstances, the ALJ erred by stating that Diaz "took a drug test administered by his physician" on June 11 and that the result of the "test was negative." (ALJD 6:20)

Because of the ALJ's favorable ruling sustaining Manhattan Beer's objection and rejecting the offered exhibit and its content, there was no reason for Manhattan Beer to offer any further testimony by way of cross-examination or rebuttal testimony. Manhattan Beer would be

prejudiced unacceptably if the content of the exhibit explicitly rejected *during* the proceedings and while the record was open were allowed to be considered *after* the fact of the closing of the record.

Apart from the patent error in relying on an exhibit rejected because of a sustained objection, the purported drug test was not shown to have been conducted in compliance with the rigorous "Department of Transportation and Federal Highway Administration guidelines, including those concerning accuracy, confidentiality, and personal privacy" adopted by Manhattan Beer's CBA (*See* CBA Article 39, R Ex. 2 at 22-23) There is no record evidence to indicate whether Diaz was even the donor of the specimen referenced in Rejected GC Ex. 5 or that the specimen was collected in the quarantined environment, free of adulteration or dilution, and subject to essential chain of custody controls required by Manhattan Beer. (*See* Tr. 157-61; R Ex. 11)

In these circumstances, the ALJ's statements concerning a purported June 11 drug test and its result plainly are erroneous.

POINT II

THE ALJ ERRONEOUSLY ANALYZED WHEN DIAZ'S *WEINGARTEN* RIGHTS ATTACHED

(Respondent's Cross-Exceptions 2, 3, 5 and 7)

The ALJ erred in his analysis of when *Weingarten* rights "attached" in the context of Diaz appearing at Manhattan Beer's Wyandanch facility on June 8 reeking from marijuana and with bloodshot and glassy eyes (ALJD 7:16-47). The "attachment" of *Weingarten* rights to which the ALJ refers does not occur in a vacuum or by unilateral action. Weingarten rights are not activated until there is an employee request for representation. *Id.*, 420 U.S. at 257 ("the right arises only in situations where the employee requests representation. In other words, the

employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.")

The ALJ's determination that Manhattan Beer somehow deprived Diaz of purported *Weingarten* rights prior to an actual request for representation is plainly erroneous. (ALJD 10:27-28) Diaz, himself a former shop steward (ALJD 2:18-20), willingly participated with Wetherell and Small – without ever saying that he wanted representation:

- Diaz reported to work at approximately 6:30 a.m. on June 8. (ALJD 2:49-50)
- After clocking in, Diaz looked at the routing schedule and noted he was not scheduled for a helper route assignment. (Tr. 53-54)
- Small first saw Diaz when Diaz came to the window of the office where Small worked. (Tr. 162)
- Diaz opened the window to the office and leaned inside to speak with Small. (Tr. 170)
- Small immediately noted that Diaz reeked of the smell of marijuana and that Diaz's eyes were bloodshot and glassy. (ALJD 3:28-29)
- Wetherell, who was standing nearby, commented that Diaz smelled "funny" and asked Diaz if he "was doing anything stupid." (Tr. 86-87; 99)
- Diaz "concluded that Tony [Wetherell] was talking about marijuana and how he thought it smelled on [Diaz]." (*Id.*)

There is no basis for the ALJ to find that any request for representation, as required by *Weingarten*, was made by Diaz with respect to any of the foregoing events. Accordingly, the ALJ erred in stating that Diaz's right to representation attached during questioning by Wetherell

and Small, even though Diaz did not request representation at any time relevant to *Weingarten.* (ALJD 10:27-28)

Furthermore, because the record is clear that Diaz did not request representation concerning the independent observations of Manhattan Beer managers Wetherell and Small regarding Diaz's appearance and their reasonable suspicion of his drug use, the ALJ erred in holding that Diaz became entitled to representation when Manhattan Beer managers made a reasonable suspicion determination. *Weingarten*, 420 U.S. at 257.

Also essential to a finding of a *Weingarten* violation is denial of a right to representation at an investigatory interview, and the ALJ erred by applying *Weingarten* to the drug test Diaz declined. (ALJD 7:24-47) During the June 8 meeting with Wetherell and Small, Diaz was simply instructed to submit to a drug test – having no testimonial or confrontational element – that would be conducted by an independent laboratory, not by Manhattan Beer. With no prospect of "questions of an investigatory nature" and no "'confrontation' between the employee and his employer," the contemplated drug test does not satisfy either of the tests set forth in *Weingarten* or the rationale underlying those tests, and *Weingarten* rights did not attach for that additional reason. *U.S. Postal Service*, 252 NLRB 61 (1980).

In *Safeway Stores, Inc.*, 303 NLRB 989 (1991) ("*Safeway*"), the Board expressly refrained from holding that "a drug test, standing alone, would constitute an investigatory interview under *Weingarten.*" *Id.* at 989. The drug test at issue in *Safeway* was a "first step" in a "larger controversy" in which an employer "launched" an investigation into an absence record in which the subject employee displayed no manifestations of current drug use. *Id.* at 989. The Board in *Safeway* was careful to caution against a zealous, wholesale extension of *Weingarten* to a pure situation of drug testing:

> As noted, however, the test here was part of an inquiry into Hawkins' absence record. Hence, when Latoures—carrying out his instructions to the letter—disregarded Hawkins' requests for union assistance and suspended him for not taking the drug test, Latoures was, in effect, penalizing Hawkins for claiming *Weingarten* rights with respect to the larger controversy.

Id. at 989.[6] The predicate "larger controversy" – essential to applying *Safeway* – is absent here. Simply put, Diaz was observed by managers trained in reasonable suspicion drug detection as reeking of marijuana and manifesting other indicia of drug use, and he was subject to discharge under Manhattan Beer's policy and its CBA, unless a valid negative drug test result overcame that observation. The ALJ erred by failing to make that distinction and by erroneously finding a *Weingarten* violation.

POINT III

THE ALJ ERRED BY STATING THAT MANHATTAN BEER REQUIRED A DRUG TEST AND INSISTED THAT DIAZ TAKE A MEDICAL TEST

(Respondent's Cross-Exception 6)

Having found, based on the evidence he found credible, and without any exception by the General Counsel, that Manhattan Beer *offers* employees reasonably suspected of drug use a drug test (ALJD: 7:37-39), which the employee may then pass, fail, or refuse to take (ALJD: 4-37-45; 7:36-38), the ALJ erred by stating that a drug test is a "required part" of Manhattan Beer's "investigatory process" concerning its reasonable suspicion of Diaz's drug use and that Manhattan Beer "insists on administering a medical test as part of an investigation into an employee's alleged misconduct" (ALJD 7:40-41).

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[6] A footnote in *Safeway* addresses the separate rationale of one Board Member: "This is not to say that Hawkins would have a right to union assistance at *any* drug test that may have been administered." *Id.* at n.2 (emphasis added).

Once observed by his managers who are trained and certified in observing reasonable suspicion drug use (Tr. 155-56; 162-63; R Ex. 10), Diaz knew he was exposed: "at this time I concluded that Tony [Wetherell] was talking about marijuana and how he thought it smelled on me." (Tr. 86-87; 99) Aware that he was reasonably suspected of drug use, Diaz understood that if he refused the offered opportunity to take a drug test that could refute Manhattan Beer's reasonable suspicion, the refusal would be treated as a positive result (ALJD: 4-47-5-1).

Nothing in the record supports a conclusion that: (1) Manhattan Beer required or insisted that Diaz take a drug test; or (2) Diaz labored under any misunderstanding about the opportunity offered to him and Manhattan Beer's reliance on its reasonable suspicion of his drug use if Diaz declined the opportunity to take and pass a drug test that could spare him the fate of employment termination based on the available information of reasonable suspicion. It was plain error for the ALJ to state otherwise.

POINT IV

THE ALJ ERRED IN STATING THE ROLE OF A *WEINGARTEN* REPRESENTATIVE IN THE CIRCUMSTANCES OF DIAZ'S SITUATION ON JUNE 8

(Respondent's Cross-Exception 4)

Even assuming, *arguendo*, that a *Weingarten* interview took place on June 8, the ALJ's Decision erroneously misstates the role a speculative representative with whom Diaz might have conferred could have had. While noting his awareness that "*Weingarten* cautioned against the transformation of an investigatory interview into an adversarial contest" (ALJD 8:49-50), the ALJ nonetheless speculates on the activity that a representative – other than Joe Gonzalez and Joe Henry, the shop steward and assistant shop steward actually consulted by Diaz on June 8 (R Ex. 6) – might have undertaken on behalf of Diaz. (R Ex. 6) The ALJ asserts that a representative could "challenge the basis" for the reasonable suspicion that Diaz was under the

influence of illegal drugs, and could contradict the opinions held by Manhattan Beer management. (ALJD 8:33-35). Contrary to the ALJ's expression of the contours of the speculative representation he imagines for Diaz, *Weingarten* representation may not interfere with legitimate employer prerogatives. *Weingarten*, 420 U.S. 258-59, 263. A representative may not take action that would be disruptive to the meeting. *New Jersey Bell Telephone*, 308 NLRB 277, 279 (1992)

Although the ALJ stated he is "aware that *Weingarten* cautioned against the transformation of an investigatory interview into an adversarial contest" (ALJD 8:49-50), he went on to state that this "type of assistance" – "challenging" an employer during an investigation, attempting to prove the employee's innocence, or controverting the employer's reasonable suspicion that an employee arrived to work under the influence of illegal drugs—is "required in an investigatory interview." (ALJD 8:37-39) This reasoning is erroneous and should not be adopted. *Weingarten* makes clear that a representative's role is limited to advising the employee – exactly as shop steward Gonzalez advised Diaz during their phone conversation. *Weingarten*, 420 U.S. 258-59, 263.

Accordingly, even assuming, *arguendo*, that the interactions between Diaz and Manhattan Beer managers on June 8 constituted an "investigatory interview," no violation of *Weingarten* occurred, given that Diaz received the advice he sought from the representatives of his choosing.

POINT V

THE ALJ ERRED BY STATING THAT "[A]LL THE DOCUMENTS PREPARED BY THE RESPONDENT AT THE TIME OF [DIAZ'S] DISCHARGE RECITE THAT HE WAS FIRED FOR REFUSING TO TAKE THE TEST"

(Respondent's Cross-Exception 12)

The ALJ erred by stating that "[a]ll the documents prepared by the Respondent at the time of [Diaz's] discharge recite that he was fired for refusing to take the test," without noting relevant trial exhibits and testimony, as well as his own companion findings, concerning Manhattan Beer's reasonable suspicion of Diaz's drug use and the opportunity for Diaz to take a drug test. (ALJD 10:47-48) Unambiguous trial exhibits and testimony, together with supporting findings of the ALJ, show the ALJ's finding is erroneous. (ALJD 5:15-6:18)

On the morning of his encounter with Diaz, Small filled out his June 8 "Observed Behavior – Reasonable Suspicion Record," memorializing his observations of Diaz. (R Ex. 5, at 7) The Reasonable Suspicion Record indicates that there was reasonable suspicion that Diaz was under the influence of drugs, based on his "bloodshot" and "glassy" eyes, and the fact that his "clothing reeked of the smell of marijuana." (R Ex. 5 at 7) Small and Wetherell both witnessed Diaz's behavior and signed the report indicating that, based upon their observation of Diaz and their prior reasonable suspicion recognition training and certification, there was reasonable suspicion that Diaz had reported to work while impaired by drugs. (R Ex. 5 at 7; R Ex. 10; Tr. 166-67)

Small also completed a "Progressive Disciplinary Report" ("PDR") memorializing the events of the morning of June 8. (Tr. 167-68; R Ex. 5 at 2) The PDR states:

> On Saturday, June 08, 2013, Joe Garcia Diaz reported to work at 6:33 a.m. under the influence of a controlled substance. Joe Garcia Diaz's eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana. Joe Garcia Diaz was told he must go for a drug screening because it's against Manhattan Beer's policy

to have an employee working impaired in the trade delivering beer to customers or operating equipment impaired under the influence of narcotics.

(R Ex. 5, at 2) The PDR was signed by Small, Wetherell, and shop steward Gonzalez. (R Ex. 5, at 2)

Supportively, "Union Grievance Meeting Minutes – Thursday, 6/20/13," summarizing a grievance meeting attended by LDFSJB Business Agent Stanford Dempster, shop stewards Joe Gonzalez and Jeremy Geyer and assistant shop steward Joe Henry, together with Manhattan Beer Director of Operations Ron Reif, Facility Manager Wetherell and Delivery Manager Small, and signed by the shop stewards and management attendees, show, inter alia:

- Diaz "*was terminated on Saturday, June 8, 2013 for refusing to take a drug test under the reasonable suspicion of marijuana use*," and

- Ron Reif was content with the observed reasonable suspicion of Diaz's reported drug use and "[s]tated that the company was within its rights to require testing; a refusal to take a test is the same as a positive result. Therefore, the termination stands."

(R Ex. 6)(emphasis added)

In these circumstances, the ALJ erred in failing to consider the full context of documents referring to the reason for Diaz's discharge.

POINT VI

THE ALJ ERRED BY FAILING TO FIND THAT MANHATTAN BEER ACTED PERMISSIBLY ON THE BASIS OF THE AVAILABLE INFORMATION OF REASONABLE SUSPICION OF ITS MANAGERS AFTER DIAZ REJECTED THE OPPORTUNITY TO TAKE A DRUG TEST

(Respondent's Cross-Exceptions 10 and 11)

Weingarten prescribes explicit options – for both Diaz and Manhattan Beer: Diaz could exercise his right to refrain from the drug test that would have furthered the investigation into his reasonably suspected drug use by relinquishing any potential benefit of testing negative, thereby

leaving Manhattan Beer free to act on the basis of available information obtained from other sources.[7]

As found by the ALJ, Diaz knew that Manhattan Beer management would make a personnel decision based on: (1) the information available to it, (2) the reasonable suspicion observed by Small and Wetherell, and (3) its practice and contractual right to regard a refusal of the opportunity to take a drug test as a positive result. (ALJD 4:41-5-1) The Board recently reiterated its intention to respect decades of case law interpreting *Weingarten*, as urged here by Manhattan Beer. In *YRC Freight*, 360 NLRB No. 90, slip op. at 2 (April 30, 2014) ("*YRC*"), the Board held that:

> [A]n employer confronted with an employee request for *Weingarten* representation may respond by choosing *not* to move forward with the investigative interview. In such a situation, there are two consequences, both permitted under *Weingarten*: (a) the employee is deemed to be "relinquishing" any benefit associated with explanations the employee might have conveyed during the aborted interview; (b) the employer can make a disciplinary decision based on other information in its possession.

(emphasis in original)

The ALJ erred by failing to recognize that Manhattan Beer management is authorized by Board law to refrain from "mov[ing] forward" with further information Diaz might have supplied had he opted to take a drug test; it could accept Diaz's "relinquish[ment]" of the opportunity and "benefit associated with" a drug test that may have refuted Manhattan Beer's

[7] The ALJ notes the right of Manhattan Beer to proceed on the basis of available information, but does not make the necessary connection to the facts of this case:

> When Diaz refused to take the drug test, the Employer may have advised Diaz that it would not proceed with the interview unless he was willing to speak to the managers unaccompanied by his agent. Diaz could than have refused to participate in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources. *Weingarten*, at 259.

(ALJD 9:45-50)

reasonable suspicion of his drug use. *YRC*, 360 NLRB No. 90, slip op. at 2. In such a situation, *YRC* expressly affirms that Manhattan Beer was authorized to "make a disciplinary decision based on other information in its possession." *Id.*

POINT VII

THE ALJ ERRED BY HOLDING THAT *WEINGARTEN* REQUIRES THE "PHYSICAL PRESENCE" OF A REPRESENTATIVE AND THAT MANHATTAN BEER DENIED *WEINGARTEN* RIGHTS BY PROCEEDING WITHOUT THE PHYSICAL PRESENCE OF A REPRESENTATIVE

(Respondent's Cross-Exceptions 7, 13, 14, 15 and 17)

From two drug tests Diaz took previously in connection with his Manhattan Beer employment, Diaz knew well that a physical presence of a representative is not allowed by the collector (Tr. 81-83); the specimen was collected in a quarantined environment, free of adulteration or dilution, and subject to essential chain of custody controls required by Manhattan Beer under the CBA and the applicable federal regulations it adopts (Tr. 157-61; R Ex. 11). Based on his personal prior experience, Diaz admits to knowing that drug testing occurs with no union representative present "either at the facility or in the toilet area, where [he] gave the specimen" (Tr. 84-85).

The ALJ erred by inaccurately imputing to the United States Supreme Court a *Weingarten* requirement "of physical presence of the union agent who 'is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.' *Weingarten*, 251 U.S. at 260." (ALJD 9:35-39) Nowhere does *Weingarten* speak to a "physical presence" of a representative, and it was error for the ALJ to indicate otherwise.

The infirmity of the ALJ's findings and related analysis concerning a "physical presence" requirement is evident from the Board's previous rejection of the General Counsel's attempt to

apply *Weingarten* to require the physical presence of a representative. *Meharry Medical College*, 236 NLRB 1396, 1406 (1978) ("*Meharry*") (holding that there was sufficient representation when an employee consulted a union attorney telephonically). In *Meharry*, the contacted representative, speaking by phone, advised the employee to "stick to his guns" and not undergo a medical examination. *Id.* Adopting an ALJ's recommended Order, which found "the General Counsel's *Weingarten* contentions to be without merit" because the employee "was not denied union representation" when "[h]e telephonically consulted with the Union's attorney and acted upon his advice to 'stick to his guns' in not undergoing the medical evaluation," the Board in *Meharry* held that there was no *Weingarten* violation.

The ALJ found that Diaz received substantially the same advice during his June 8 phone consultation with shop steward Gonzalez that qualified as compliant with the *Meharry* interpretation of *Weingarten* protections:

> According to Diaz, Gonzalez told him that if he felt "strongly enough" that his rights were being violated and he needed his representative, he should not take the test.

(ALJD 4:26-28) Gonzalez was similarly deferential to Small on June 8, telling him on a follow-up call that he understood Small's position and Small should "Do what you have to do" with respect to the reasonable suspicion of Diaz's drug use. (ALJD 4:34-35)

With no precedential authorization, the ALJ erroneously grafted into *Weingarten* a nonexistent "physical presence" requirement. In so doing, he did not adhere to the Board's explicit holding in *Meharry* – sound in 1978, even before significant breakthroughs and reliance on telecommunications advances enjoyed today by Diaz and the population at large.

Although reversed on other grounds, one recent opinion shows the better, contemporary view of an ALJ affirmatively advocating telephonic advice as a means of satisfying *Weingarten* representation:

> I find that Clarke's request that he be allowed to telephone Castelli to seek his guidance as to whether to proceed with the second interview was a reasonable one, and constituted a specific request that he be allowed to consult with his designated union representative prior to participating in an investigatory interview, which he reasonably believed might result in discipline. As the Board has held, an employee has such a right under *Weingarten.* See *Climax Molybdenum Co.,* 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978), *Pacific Telephone & Telegraph Co.,* 262 NLRB 1048, 1049 fn. 11 (1982), enfd. 711 F.2d 134 (9th Cir. 1983); *Postal Service,* supra at 469.

Buonadonna Shoprite, LLC, 365 NLRB 1, 9 (2011)(footnote omitted). Although otherwise faulting the ALJ, the Board did not disagree with the concept that telephonic advice could be satisfactory under *Weingarten*, with Member Pearce specifically expressing his "agree[ment] with the judge's finding that the Respondent's denial of [the employee's] request to telephone [a union representative] during the afternoon meeting was unreasonable." *Id.* at 2 and n.4.

The ALJ erred, also, by stating that "Diaz attempted to locate a union agent to represent him but none were available." (ALJD 9:35-36) The ALJ made no finding that Gonzalez or any other representative selected by Diaz would be any less available at the drug test collection site, or anywhere else, than Gonzalez was when Diaz received and considered his counsel while at the Wyandanch facility – accepting or rejecting it however he chose.[8]

Moreover, the record shows that Diaz did not like the June 8 advice he received from Joe Henry as his chosen representative and preferred to march to his own beat. After all, the "Union Grievance Meeting Minutes – Thursday, 6/20/13," summarizing a grievance meeting attended by

[8] Diaz declined to disclose to Small what advice he had received from Gonzalez about taking a drug test: "that's between me and my shop steward." (Tr. 163; 176)

LDFSJB Business Agent Stanford Dempster, shop stewards Joe Gonzalez and Jeremy Geyer and assistant shop steward Joe Henry, together with Manhattan Beer Director of Operations Ron Reif, Facility Manager Wetherell and Delivery Manager Small, and signed by each of the shop stewards and management attendees, shows that Diaz stated he "did not follow through with Joe Henry's request of taking a substance abuse test on Saturday, June 8, 2013." (*See* R Ex. 6)

The ALJ ignores entirely the significance of the central fact that whether Diaz received the advice from his chosen representative face-to-face or by phone or other contact, Diaz made his own decision, contrary to the representative's advice.[9] Joe Henry's "physical presence" as Diaz's selected representative would have contributed absolutely nothing to the information available to Manhattan Beer, and Joe Henry's "physical presence" would have changed nothing concerning the reasonable suspicion of drug use for which Diaz was discharged.

Thus, the prominence the ALJ attaches in the circumstances of this case to a "physical presence" of a representative dissipates and vanishes as a *Weingarten* factor.

POINT VIII

THE ALJ ERRONEOUSLY CONCLUDED IN HIS CONCLUSIONS OF LAW THAT DIAZ DID NOT RECEIVE "PRIOR" ADVICE, WHEN IN REALITY DIAZ RECEIVED ADVICE ON JUNE 8 FROM TWO REPRESENTATIVES

(Respondent's Cross-Exceptions 8, 9, 16)

The ALJ erroneously concluded in his Conclusions of Law that Diaz did not receive "prior" advice from his chosen representative:

> By denying Joe Diaz his right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation *prior* to

[9] In the circumstances, the ALJ's unnecessary and unsubstantiated finding that there would have been no harm in "delaying the interview" (ALJD 10:1-3) is an irrelevancy.

> the test, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

(ALJD 11:20-24) (emphasis added)

The ALJ erred by not taking account of clear record evidence of Diaz's *prior* consultation with his selected shop steward:

1. Diaz called, and spoke with, shop steward Joe Gonzalez from outside the warehouse;

2. While conferring with Gonzalez, Diaz exercised his right to refuse Wetherell's request that he accompany Wetherell to a drug testing collection site;

3. Diaz additionally asked Gonzalez to be present with him and show him the new collective bargaining agreement, but Gonzalez said he was unavailable on his day off and he did not have a copy of the new collective bargaining agreement with him;

4. Gonzalez advised Diaz that if he felt strongly enough that his rights were being violated and that he needed representation, he should just not take the drug test; and

5. Diaz refused to take the drug test, after being told by Small that a refusal would be considered a positive result and he could be terminated.

(ALJD 4:15-39)

Additionally, Diaz "did not follow through with Joe Henry's request of taking a substance abuse test on Saturday, June 8, 2013" (*See* R Ex. 6), advice which, if followed and not rejected, would have allowed Diaz the opportunity to refute Manhattan Beer's reasonable suspicion of his drug use – if he was drug-free. But instead, on the same day Manhattan Beer offered Diaz the opportunity to take a drug test that could have cleared him of Manhattan Beer's reasonable suspicion of drug use, Diaz stepped back, reached out to Joe Henry as his preferred representative, received Henry's advice that he should take the drug test offered by Manhattan Beer on June 8 – and after considering Henry's advice, Diaz affirmatively elected for reasons of his own to reject it.

Erroneously, the ALJ ignored entirely the significance of the central fact that Diaz received "prior" advice from Joe Gonzalez and Joe Henry, his chosen representatives, and he then made decisions of his own whether to follow their advice and whether to take advantage of an opportunity to refute Manhattan Beer's reasonable suspicion of drug use by taking a drug test. *Weingarten* requires nothing more, and the ALJ erred by concluding that Manhattan Beer violated Diaz's *Weingarten* rights when it is clear he received "prior" advice.

POINT IX

THE ALJ ERRONEOUSLY ORDERED MANHATTAN BEER TO CEASE AND DESIST FROM DENYING DIAZ *WEINGARTEN* RIGHTS

(Respondent's Cross-Exception 18)

The ALJ erred by ordering Manhattan Beer to cease and desist from "Denying Joe Garcia Diaz or any employee his or her right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation to the test." For the reasons stated in this brief, Manhattan Beer did not violate the National Labor Relations Act or compromise in any respect Diaz's *Weingarten* rights. Accordingly, no remedial order is appropriate.

CONCLUSION

For the reasons stated in this brief, the Board should reverse the ALJ's rulings, findings, conclusions, recommendations and orders to the extent they hold, or support allegations, that Manhattan Beer violated Diaz's *Weingarten* rights. With respect to matters outside the scope of Manhattan Beer's Cross-Exceptions and this brief, the ALJ Decision should be affirmed as stated in Manhattan Beer's Answering Brief to General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision, filed contemporaneously with this brief.

Dated: New York, New York
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